



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2018-UNAT-876

**Cardwell
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Richard Lussick
Case No.:	2018-1169
Date:	26 October 2018
Registrar:	Weicheng Lin

Counsel for Appellant:	George Irving
Counsel for Respondent:	Rupa Mitra

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/030, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 28 February 2018, in the case of *Cardwell v. Secretary-General of the United Nations*. Mr. Mark Cardwell filed the appeal on 27 April 2018, and the Secretary-General filed his answer on 26 June 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... [The] Applicant joined [the United Nations Development Programme (UNDP)] on 27 September 2009 when he was appointed to the post of Chief, Corporate Online Communications and Multimedia at the P5 level (“the Applicant’s post”) in what is now the Online and Digital, Communications Group [“CG”], Bureau of External Relations and Advocacy [“BERA”].

... Between 2013 and 2014, UNDP underwent a restructuring/realignment process. The features and details of the restructuring/realignment process are set out in the UNDP document “People Realignment Policy and Processes”.

... On 19 May 2014, the UNDP Administrator announced that pursuant to the new Strategic Plan for UNDP, new organograms reflecting the relocation, revision and reduction of a number of posts and grades would be released on 21 May 2014. The announcement stated that “many people[’s] jobs are affected, and we will be embarking on a realignment process aimed at being as fair and transparent as possible to fill the new positions. (...) All organograms will be made available on a dedicated intranet site, and at that time all staff at headquarters and working at regional level centres will receive formal notification that they are within the definition of affected staff. Bureau managers will then work with individual staff members to confirm the status of their existing position”. Staff members who were not matched to a post in the new structure would then participate in job fairs for the remaining posts available. Details of a voluntary separation package were also provided.

... On 21 May 2014, the UNDP Administrator published the new bureau organograms. The published organograms were described as “represent[ing] the new Headquarters, Regional Hubs, Representation Offices, Global Shared Services Centres and Global Policy Centre configurations [...], [they] are the first step of the realignment process within each bureau and across bureaux. There will continue to be some fine-tuning of the organograms as the realignment proceeds [...]. In particular,

¹ Impugned Judgment, para. 4 (italics and bold emphases in the original omitted).

the process of functionality aligning [Information and Technology, (“IT”)], procurement, [Human Resources, (“HR”)], and finance between all bureau and [Bureau of Management, (“BOM”)] are still ongoing.”

... With respect to the Applicant’s Online and Digital cluster, CG, BERA an organogram was published reflecting that his post no longer existed and in its place was a P4 post of Team Manager, Online and Digital, CG, BERA (“the P4 post”). A vacancy announcement for the P4 post was subsequently published with an 18 August 2014 application deadline.

... On 23 May 2014, [name redacted, Mr. MON], Assistant Administrator, BERA, along with [name redacted, Ms. FG], Deputy Director, BERA, met with the Applicant to explain the changes affecting the positions in CG, BERA as reflected in the organigram. The Applicant was informed that the new configuration for CG, BERA would not include a P5 Chief, Online Communication but that a Team Manager at the P4 level who would head Online and Digital, CG, BERA. That same day, the Applicant sent a message indicating that in his view this decision was a mistake.

... On 13 June 2014 and subsequent to the publishing of the organogram, the Applicant attended a meeting of the communications group, at which the Director, BERA discussed the post of Deputy Director (P5) [(“the Deputy Director P5 post”)], CG, BERA. CG, BERA was composed of six clusters: Media and Advocacy; Online and Digital; Services and Outreach; ExO [unknown abbreviation] Outposted Communications Team; [the Bureau for Policy and Programme Support, (“BPPS”)] Outposted Communications Services; and Regional Hubs Outposted Communications Services.

... On 17 June 2014, the Applicant attended a meeting for the purpose of discussing the drafting of Job Descriptions (JD) for the posts reflected in the BERA Organogram. Following this meeting, the Applicant drafted the initial JD for the P4, Online and Digital, CG, BERA.

... On 21 July 2014, the Applicant received an email from a UNDP Associate Administrator, which stated that the Office of Human Resources had “notified staff members who have been confirmed in positions in the new organizational structure” and that those who had not received such a confirmation “have the opportunity to participate in the job fairs”. The Applicant was not the recipient of a notification confirming him in his position.

... On 22 July 2014, the Assistant Administrator, BERA, requested the classification by the Organization and Design Unit (ODU) of five posts, including the proposed post of Team Manager, Online and Digital, CG, BERA.

... On 23 July 2014, an external consultant initially scored the post at the P5 level by applying the International Civil Service Commission (ICSC) system.

... On 24 July 2015, ODU then applied the Global Master Standard which then scored the post at the P4 level.

... Following some minor modifications to the text, the Team Manager post was formally classified at the P4 level. On 1 August 2014, ODU informed the Assistant Administrator, BERA, that they had finalized the review and classification of the post of Team Manager, Online and Digital, CG, BERA, as P4.

... On 26 July 2014, the Applicant applied for the Deputy Director P5 post. On 7 September 2014, the Applicant applied for additional posts of DI Senior Advisor, Development Effectiveness in [BPPS] and P5 Global Policy Advisor, Knowledge Management and Innovation, BPPS.

... By 8 October 2014, the Applicant was informed that he was unsuccessful in the job fairs, including for the P5 post of Deputy Director. An external candidate was selected for the Deputy Director P5 post.

... On 16 October 2014, the Applicant filed a request for management evaluation ("RME") challenging the "1) decision to reclassify [the Applicant's] post downwards; 2) decision to separate [the Applicant] on the basis of reclassification of [his] post; 3) decision to remove all of [his managerial responsibilities until year-end, a constructive dismissal; 4) decision to foreclose the possibility of appropriate reassignment through the job fair by: (a) pre-selecting particular posts to go to external candidates[; and] (b) generating an opaque, perpetually morphing and apparently ad hoc process of change management".

... On 4 November 2014, the Applicant received a letter notifying him that he would be separated at the expiry of his appointment on 31 December 2014.

... On 13 November 2014, UNDP responded to the Applicant's [RME] and conveyed its decision that there is no legal basis to accede to the Applicant's request.

... The Applicant was separated from service on 31 December 2014.

3. On 12 February 2015, Mr. Cardwell filed an application with the UNDT contesting a) the decision to abolish and reclassify his post; b) his non-selection in the retention exercise; c) the decision to remove his managerial responsibilities; and d) the non-renewal of his fixed-term contract. In his later submission dated 4 August 2017, Mr. Cardwell clarified that he only wished to contest his non-selection in the retention exercise and the non-renewal of his fixed-term contract.

4. On 28 February 2018, the UNDT issued Judgment No. UNDT/2018/030, dismissing Mr. Cardwell's application. The UNDT found that Mr. Cardwell had failed to request management evaluation of the decision not to renew his fixed-term contract and, as such, his claim in this regard was not receivable. As for Mr. Cardwell's non-selection in the retention exercise, the UNDT held that the Secretary-General at least minimally demonstrated that

Mr. Cardwell had received full and fair consideration for the Deputy Director post at the P-5 level. Therefore, the burden of proof had shifted to Mr. Cardwell who had to show through clear and convincing evidence that the selection process was motivated by bias in favour of an external candidate. The UNDT found that Mr. Cardwell provided no evidence to support the said contention. Based on the foregoing, the UNDT held that Mr. Cardwell's appeal against the decision not to renew his fixed-term contract was not receivable *ratione materiae* and that Mr. Cardwell had failed to establish that his candidacy for the Deputy Director post at the P-5 level was not given full and fair consideration.

Submissions

Mr. Cardwell's Appeal

5. Mr. Cardwell submits that the UNDT erred in law and fact by finding the issue of non-renewal of his fixed-term contract and his subsequent separation from service to be non-receivable based on the conclusion that he had failed to request management evaluation of the decision not to renew his contract. In particular, the UNDT took the most restrictive interpretation possible when it held that Mr. Cardwell was precluded from challenging the 4 November 2014 decision not to renew his fixed-term contract because it post-dated his RME of 16 October 2014 and had not formed part of the management evaluation. Mr. Cardwell contends that he was on notice of the impending separation from the moment he was advised that he had been unsuccessful in the job fairs, i.e. 8 October 2014. The UNDP Administrator's 21 May 2014 communication notified that staff who remain without a position after participating in the job fairs "will be separated". Based on this communication, Mr. Cardwell understood that if he was unsuccessful in the final phase of the job fair, he would be separated. It follows that the 4 November 2014 communication merely confirmed a decision that had already been taken.

6. As to the UNDT's finding that Mr. Cardwell's 16 October 2014 RME focused on his separation from service on the basis of a reclassification of his post and it did not refer to the non-renewal of his contract, Mr. Cardwell submits that he clearly referred to the "decision to separate" him in his RME and it is clear from his submissions that he was not challenging the reclassification of his post in isolation. Moreover, the UNDT's holding that the decision not to renew Mr. Cardwell's fixed-term contract had not formed part of the RME is

disingenuous in light of the then ongoing actions abolishing his post and relieving him of his managerial responsibilities even before his separation was formally communicated.

7. Mr. Cardwell asserts that the decision not to renew his fixed-term appointment is the direct result of an abuse of discretionary authority in that it appears to have been engineered solely to effect his separation. The Appeals Tribunal has held that it may examine the circumstances surrounding the abolition of post to determine whether the impugned decision was tainted by abuse of authority. Mr. Cardwell notes that the entire Communications Group team was replaced in the course of realignment with external candidates. Moreover, his own post was originally classified at the P-5 level by an outside consultant using the ICSC standard but later subjected to a second classification, using a different standard, which classified it at the P-4 level. In this case, the only way to provide judicial scrutiny of the fairness of the process would be to order the production of documentation surrounding the desk review for the P-5 post of Deputy Director, however none was ordered or produced.

8. As for the UNDT's holding that Mr. Cardwell never alleged that the Secretary-General failed to make a good faith effort to place him pursuant to the Staff Rules, he contends that this is precisely the *gravamen* of his related claim regarding the downgrading of his post to P-4 and the selection of an external candidate for the P-5 Deputy Director post. Pursuant to Staff Regulation 9.3 and Staff Rule 9.6(e), subject to the order of retention and the availability of suitable posts, Mr. Cardwell had the right to be retained in service and the Secretary-General had the correlative obligation to retain him in service in any of the available suitable posts in which his services could be effectively utilized with due regard to relative competence, integrity and length in service.

9. Mr. Cardwell further submits that the UNDT erred when it rejected his claim that his candidature for the P-5 post of Deputy Director did not receive full and fair consideration. On 13 June 2014, the Director of BERA announced that approval for the recruitment of an external candidate for the P-5 Deputy Director post was sought and obtained in advance, before his own candidacy and that of his colleagues had been considered. Mr. Cardwell had questioned why none of the internal candidates who applied for the P-5 post were found qualified, justifying an external advertising and recruitment process, and also questioned the credibility of the mere desk review of the posts, as opposed to the required competitive selection processes, to which he had applied.

10. Moreover, the UNDT erred by unfairly shifting the onus of proof to him to show that his candidacy was not given full and fair consideration. Mr. Cardwell contends that “[o]nce challenged, the burden is on the [Secretary-General] to demonstrate that [staff member’s] candidacy was given full and fair consideration. The [Secretary-General] is specifically obliged to produce the records of the selection process.” Consequently, the UNDT’s conclusion that the Secretary-General minimally demonstrated that Mr. Cardwell had received full and fair consideration based on the list of agreed facts cannot be seen to meet this burden of proof.

11. Mr. Cardwell requests that the Appeals Tribunal vacate the contested Judgment and find in his favour. He also requests that the Appeals Tribunal order reinstatement or, in the alternative, award compensation in the amount of two years’ net base salary. In addition, Mr. Cardwell requests that the Appeals Tribunal award him USD 5,000 for the Office of Staff Legal Assistance’s (OSLA) failure to articulate his claims in a proper manner, including his RME.

The Secretary-General’s Answer

12. The Secretary-General submits that the UNDT properly concluded that Mr. Cardwell had failed to request management evaluation of the decision not to renew his appointment and on that basis, it correctly dismissed his claim.

13. In particular, the UNDT rightly pointed out that the 4 November 2014 decision not to renew Mr. Cardwell’s appointment post-dated his RME of 16 October 2014. Mr. Cardwell had not expressly referred to any decision not to renew his appointment in the list of decisions he included in his RME. In fact, both the RME and the management evaluation response focused on Mr. Cardwell’s challenge of the decision to separate him on the basis of reclassification of his post. Moreover, the UNDT correctly found that Mr. Cardwell was on notice that the decision not to renew his appointment was not covered in the management evaluation response and that he should have filed another RME of that specific decision once it had been communicated to him. The established jurisprudence of the Appeals Tribunal has affirmed that requesting management evaluation is a mandatory first step in the appeal process. Therefore, on these grounds alone, the UNDT could have dismissed Mr. Cardwell’s challenge of the decision as non-receivable.

14. Contrary to Mr. Cardwell's assertion that he was not required to wait until he was notified of the non-renewal decision before seeking management evaluation of that decision because he knew he would be separated before he was so informed, the letter dated 4 November 2014 was the only express notice that Mr. Cardwell received and that letter did not serve to confirm any earlier oral or other communication to him. According to the jurisprudence of the Appeals Tribunal, the date of an administrative decision is based on the objective elements that both parties can accurately determine. In his answer to the question of "[w]hen was the decision [that you are requesting us to evaluate] taken/when did you become aware of it?" contained in the RME cover form, Mr. Cardwell stated that "[t]he opacity of the process has made it almost impossible to determine when final decisions were taken". Such response hardly complies with the need for objective elements that the parties can accurately determine. Mr. Cardwell thus did not and could not have sought management evaluation of a non-renewal decision that had not yet been communicated to him. Therefore, he was correctly prohibited from contesting the same decision before the UNDT, having failed to request management evaluation of the non-renewal decision prior to attempting to challenge it before the UNDT.

15. The Secretary-General further submits that the UNDT properly dismissed Mr. Cardwell's challenge of his non-selection for the P-5 Deputy Director post. Specifically, the UNDT correctly applied the burden of proof to Mr. Cardwell's claim that the Secretary-General did not give his candidacy full and fair consideration. Mr. Cardwell asserts, without citing any support, that "[o]nce challenged, the burden is on the [Secretary-General] to demonstrate that the [staff member's] candidacy was given full and fair consideration". Contrary to Mr. Cardwell's assertion, it was his burden to prove unlawful bias by clear and convincing evidence. This cannot be done by merely asking a question as to why none of the internal candidates for the P-5 Deputy Director post were selected, or merely voicing doubt about a process.

16. Moreover, Mr. Cardwell makes arguments for the first time on appeal regarding the Administration's efforts to place him during the restructuring exercise by citing Staff Regulation 9.3 and Staff Rule 9.6. The UNDT correctly observed that Mr. Cardwell had not made any such arguments. The Appeals Tribunal has repeatedly held, "an appellant cannot raise new arguments on appeal that were not made before the UNDT although available

at the time.”² Consequently, he cannot raise new arguments on appeal that were not made before the UNDT, though available at the time.

17. Further, whereas Mr. Cardwell claims that the Director of BERA announced at the meeting of 13 June 2014 in front of “numerous witnesses” that he had received approval to advertise the P-5 Deputy Director post in question externally and that he had expected to place one of the shortlisted candidates for another post as the Deputy Director, Mr. Cardwell failed to call any of the alleged “numerous witnesses”. Even assuming, *arguendo*, that the Director of BERA had made the alleged announcement, such statement would not have shown by clear and convincing evidence that the decision was motivated by bias or was in any other way unlawful. In fact, the Director of BERA was not on the panel that reviewed the applications for the P-5 Deputy Director post in question, nor did he have a role in recommending a candidate during the desk review. Rather, it was the panel who decided independently not to recommend an internal candidate after two rounds of advertising the post. Therefore, the UNDT correctly held that Mr. Cardwell provided no evidence whatsoever that the selection process had been tainted. It was thus within the UNDT’s discretion to find that Mr. Cardwell had failed to establish his case to the required standard.

18. Finally, the Secretary-General submits that Mr. Cardwell has not justified any of his claims for compensation or other relief. With respect to his request for compensation for moral harm, the Appeals Tribunal has held that an award of moral damages that is not supported by evidence must be rejected. Mr. Cardwell has not produced any evidence of moral harm. As for his request for compensation for his counsel’s “failure to articulate his claims in a proper manner, including his RME”, the Appeals Tribunal has held that, even where a staff member has relied on erroneous advice from OSLA, there were no exceptional circumstances that would have allowed the staff member to circumvent the legal requirements for contesting an administrative decision. As such, Mr. Cardwell should not be awarded compensation for his own failures or those of his counsel.

19. Mr. Cardwell has failed to establish any basis for reinstatement to a P-5 position or for an award of compensation in the alternative. Accordingly, the Secretary-General requests that the Appeals Tribunal affirm the Judgment and dismiss the appeal in its entirety.

² *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 37.

Considerations

20. Mr. Cardwell has contested his non-selection in the retention exercise and also the non-renewal of his fixed-term contract. The UNDT found that Mr. Cardwell had failed to request management evaluation of the decision not to renew his fixed-term contract and, as such, his claim in this regard was not receivable. Mr. Cardwell contended that the UNDT took the most restrictive interpretation possible when it held that he was precluded from challenging the 4 November 2014 decision not to renew his fixed-term contract.

21. Therefore, the first issue to be determined is whether the UNDT erred on a question of law in finding that the issue of non-renewal of Mr. Cardwell's fixed-term contract was not receivable *ratione materiae* on the basis that he had failed to request management evaluation of that decision.

22. It is an established principle that a request for a management evaluation is the first step in the appeal process of an administrative decision; this first step is mandatory. Indeed, Staff Rule 11.2(a) provides as follows:³

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

23. Moreover, the Appeals Tribunal has held that “[i]t is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties’ contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”.⁴ We find no fault with the UNDT’s reasoning when it defined and identified the administrative decisions to be determined. We therefore uphold the UNDT’s finding that the issue of the non-renewal of Mr. Cardwell’s fixed-term contract was not receivable *ratione materiae*.

³ Secretary-General’s Bulletin ST/SGB/2014/1 (Staff Regulations and Staff Rules of the United Nations) is applicable to the facts of this case.

⁴ *Fasanella v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-765, para. 20 (internal citation omitted).

24. The second issue is whether the UNDT erred in law when it rejected Mr. Cardwell's claim that his candidature for the P-5 post of Deputy Director did not receive full and fair consideration.

25. Mr. Cardwell questioned why none of the internal candidates who applied for the P-5 post were found qualified, and also questioned the credibility of the "mere desk review" of the posts, as opposed to the competitive selection processes, to which he had applied. We note that according to UNDP's People Realignment Policy and Processes, competitive selection process for posts at the P-5 level and above may entail interviews *or* desk reviews. Therefore, it was within the Administration's discretion to determine whether conducting a desk review of the candidates' applications would be suitable under the circumstances.

26. The UNDT found that the Secretary-General had been able to at least minimally demonstrate that Mr. Cardwell had received full and fair consideration in the selection process for the P-5 post and it was therefore left for Mr. Cardwell to show that the process was motivated by bias. As we stated in *Aliko*, "[i]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged. Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration. The burden is on the candidate challenging the selection process to prove through clear and convincing evidence that he or she did not receive full and fair consideration of his or her candidacy, the applicable procedures were not followed, the members of the panel exhibited bias, or irrelevant material was considered or relevant material ignored."⁵ In the present case, we agree with the UNDT that there was no evidence forthcoming from Mr. Cardwell to corroborate his contention of bias; a claim of bias is a very serious claim and "ha[s] to be established on the balance of probability by the person alleging same".⁶ Indeed, the burden of proof shifted to Mr. Cardwell to prove his allegations and there is no evidence that he had done so.

⁵ *Aliko v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-540, para. 30 (internal citations omitted).

⁶ *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-547, para. 33, citing *Macharia v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-128, para. 16.

27. We have considered all grounds of appeal and find them to be without merit. As for Mr. Cardwell's claim that the Secretary-General failed to make good faith efforts to place him during the restructuring exercise pursuant to Staff Regulation 9.3 and Staff Rule 9.6(e), we wish to emphasise that Mr. Cardwell is not permitted to and cannot raise arguments on appeal which he did not raise before the UNDT. Arguments in support of a case which are available at the time when the application is made at the UNDT must be advanced at the hearing of the case before that Tribunal and not at the Appeals Tribunal.⁷ The Appeals Tribunal will not hear and/or entertain new grounds for appeal which were in an applicant's knowledge and were not raised or argued before the UNDT.

28. Accordingly, we agree with the reasoning of the UNDT and uphold its Judgment. Mr. Cardwell's appeal is dismissed.

⁷ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 37.

Judgment

29. The appeal is dismissed and Judgment No. UNDT/2018/030 is hereby affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Thomas-Felix
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Lussick

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar